Wee Choo Keong v Pendakwa Raya

HIGH COURT (SHAH ALAM) — SEMAKAN JENAYAH SELANGOR NO 43-4-90
WAN YAHYA J
19 JANUARY 1990

Legal Profession — Counsel acting as witness — Counsel holding brief at inquest — Prosecution requiring him to be called as witness — Prosecution objecting to counsel's presence on watching brief — Legal Profession (Practice and Etiquette) Rules 1978, r 28

The petitioner is counsel retained by the family of a deceased detainee to hold watching brief at the inquest. The prosecuting officer, during the inquest, objected to the petitioner's presence in court as counsel on a watching brief as his statement had been recorded and he would be called as a witness. The objection was upheld in accordance with s 28 of the Legal Profession Act 1976. The petitioner, being unhappy with the order of the magistrate, wrote a letter to the High Court at Shah Alam, and the matter was called for hearing.

Held, varying the magistrate's order:

(1) Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978 does not envisage that an advocate and solicitor is ipso facto excluded from appearing as such in court, the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.

(2) The only matter which appears to be in conflict with the petitioner's presence is the allegation that he and not the deceased's son wrote the police report. The problem could be fairly solved by confining the magistrate's order only to that stage of the proceeding if and when the deceased's son is about to give evidence.

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 255
Federal Constitution art 5(2)
Legal Profession Act 1976 s 28

Petitioner in person.
Ibrahim bin Taib (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Wan Yahya J: In consequence to a letter received from the petitioner, herein I have called for this hearing.

The petitioner, according to his own letter, is the counsel retained by the family of a deceased detainee who died whilst in police custody. At the subsequent inquest held at the Magistrate's Court Klang, the prosecuting officer took objection to the petitioner's presence in court as counsel on a watching brief on the ground that his statement had been recorded by the police and that he would be called as a witness in that case.

The learned magistrate upheld the prosecuting officer's objection and ruled that in accordance with s 28 of the Legal Profession Act 1976, the petitioner could not represent the deceased family.

Counsel is unhappy about the order because as had been disclosed to the learned magistrate as well as in his statement to the police, he had no knowledge about the case until retained by the deceased's family on 24 June 1989. According to him, on the day the death occurred, he was away in Japan. There was therefore no conflict of interest to warrant s 28 to be applied against him.

In reply, the prosecuting officer said he was unable to state to what extent the petitioner was involved in the case other than that some witnesses had alleged that the petitioner was with the deceased's son at the time he lodged a police report and that the petitioner himself had written the report on behalf of the deceased's son.

At first glance, it would seem that the issue does involve art 5(2) of the Federal Constitution and s 255 of the Criminal Procedure Code (FMS Cap 6) and r 28 of the Legal Profession (Practice and Etiquette) Rules 1978 and not the Act as cited by both the learned magistrate and counsel's application.

The rights under art 5(2) of the Federal Constitution and s 255 of the Criminal Procedure Code (FMS Cap 6) appear to be inapplicable here as both provisions of the law speak of accused persons to be defended and not of counsel's appearance at an inquest.

Rule 28 explained as 'Advocate and Solicitor not to appear in a case where he is a witness' reads:

> (a) An advocate and solicitor shall not appear in Court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interest.

This section to my mind does not envisage that an advocate and solicitor is ipso facto excluded from appearing as such in court, the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.

In a case like this, the rule of common sense and fair play in keeping with our tradition of maintaining a fair and impartial adversarial system should be observed.

The only matter which appears to be in conflict with the petitioner's presence is the allegation that he and not the witness wrote the report. The problem could be fairly solved by confining the order of the learned magistrate on the exclusion of counsel only to that stage of the proceeding if and when the deceased's son is about to give evidence and it is hereby so ordered.

Order accordingly.

Solicitors: *Wee Choo Keong & Faaiz.*

Reported by *Zarinah Marican*